No. 311 Sup. Ct. Reply Br. of Mr. Kimsdale

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

Filed May 18, 1896.

No. 311.

THE PATAPSCO GUANO COMPANY, APPELLANT,

versus

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, W. R. WILLIAMS *et al.*, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF IN REPLY OF COUNSEL FOR APPELLANT.

FIRST. THE ACT OF JANUARY 21ST, 1891 (PUBLIC LAWS OF 1891, CH. 9), ENTITLED AN ACT TO AMEND CHAPTER 1, VOLUME 2, OF THE CODE, RELATING TO AGRICULTURE AND GEOLOGY, IS UNCONSTITUTIONAL UPON ITS FACE.

This act must be read in connection with the other statutes *in pari materia*. It undertakes to make certain specific amendments to certain sections in the chapter of The Code relating to agriculture and geology. The presumption is that the legislature did not intend to amend the other sections of the chapter which are not mentioned in the amendatory act, and it would be a strained construction to hold that section 10 of the amendatory act, which provides that all laws and clauses of laws in conflict with this act are hereby repealed, was intended to repeal those sections of the said chapter which were not mentioned. His honor Judge Seymour takes this view. (See record, p. 28.)

It is true the Act of 1891 declares that, "for the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing materials in this state, there shall be a charge of twenty-five cents per ton;" but the act does not declare that this is the only purpose; and under the uniform construction of the law by the board of agriculture and the

attorney general of the state, the funds arising from this tax have been appropriated to the other purposes authorized by law.

An examination of chapter 1, volume 2 of The Code, will disclose the fact that the board of agriculture is charged with the maintenance and support of the following objects:

1. An analyst, whose duty it shall be not only to analyze fertilizers, but also to carry on experiments on the nutrition and growth of plants and such other investigations as the department may direct. See Vol. II, Code, sec. 2196. He is also to make analyses for purposes connected with the hygienic duties of the superintendent of health. Such analyses shall include soil, drinking water and articles of food. (See Code, sec. 2197.) His salary is expressly made payable out of the funds of the department of agriculture. This section is specially amended by the Act of 1891, and therefore is not repealed by this act.

2. Section 2198 of The Code provides that the state geologist may have all his marls, soils, minerals and other products analyzed by the state chemist at the laboratory of the department free of charge, and the board of agriculture is hereby expressly authorized to pay the necessary expenses of the geological museum, and they may authorize and supervise the publication of the second volume of the Geology of North Carolina. This section is not repealed, but is expressly amended by the Act of 1891. Thus an analyst is to be employed for other purposes than the inspection of fertilizers, and he is to be paid out of the funds of the department of agriculture, which are derived solely from the so-called inspection tax, and these funds are thus diverted from their proper application.

The defendants contend (see brief, page 5,) that the fertilizer tax fund is relieved from the appropriation for the support of the *geological survey*. This is admitted, but it is the only expenditure in this connection of which the board of agriculture has been relieved. Section 2198 has not been repealed or amended in any other respect, and the board of agriculture has accordingly continued to expend the funds arising from the fertilizer tax in the support and maintenance of the geological museum. The curator's salary of $900 per annum (see record, p. 69) is not otherwise provided for.

3. The department of agriculture is directed by section 2199 to prepare hand-books with maps, containing all necessary information in regard to the mines, minerals, forests, etc., and statistics for immigrants, and make illustrative expositions of the attractions of the state whenever practicable at international exhibitions, and to offer premiums for the encouragement of agricultural and mechanical pursuits, and the raising of improved livestock in this state.

This section was left untouched upon the Act of 1891, and the board of agriculture have accordingly, under warrant of this law, and under the advice of the attorney general (printed record, pp. 84, 85, 86) appropriated $9,000 to make an exhibit of North Carolina's resources at the World's Fair at Chicago (record, p. 40); $1,300 to the Secretary, who devoted an entire year to the World's Fair work; and in addition to this the board appropriated $300 more to the same work. (See record, p. 79.) All this came out of the fertilizer tax fund.

Feeling the force of this appropriation, the defendants at first pretended that it was nothing but a loan. (See bill of complaint, p. 17.) But when confronted with the records of the board (record, pp. 81 and 84), they admit it to be an appropriation, and make a weak excuse for having solemnly represented it to be a loan in their sworn answer.

4. Section 2200 authorizes the department to employ immigration agents in foreign countries. There is no provision of law for paying them except out of the fertilizer tax.

5. Section 2201 of The Code provides for establishing and keeping a general land and mining registry at the expense of the department. This has never been repealed.

6. Sec. 2206 provides for the annual appropriation of $500 for the North Carolina Industrial Association. The plaintiff contends that this appropriation has not been repealed. (See former brief, p. 58, where the question of repeal is discussed.)

7. The $5,000 annual appropriation to the N. C. College of Agriculture and Mechanic Arts is still in force. Acts 1885, ch. 308, Acts 1887, ch. 418 (see former brief, p. 58).

For what purpose defendants' counsel cite chapter 338 of the Acts of 1891, in regard to the oyster interests, is not perceived, as the department was never charged with any burden in respect to these interests.

The defendants argue that the legislature must have intended to repeal all of the laws appropriating the funds of the agricultural department to other objects, because it tried to do so in the three instances named, to-wit, the appropriation to the N. C. Industrial Association, to the N. C. Agricultural College, and to the geological survey; but if by any mishap it has failed to accomplish its purpose, the court is asked to take the will for the deed and to hold that the fertilizer tax law is constitutional. We submit that the legislature must be presumed to have done exactly what it did, nothing more, nothing less; and if there is a single object to which the fertilizer tax is still to be applied, other than the necessary expenses of inspection, it must be conclusively presumed that the legislature intended such application.

If the law authorizes the diversion of a single dollar of the fertilizer tax to purposes foreign to the necessary expenses of inspection, the irresistible conclusion is that a tax has been levied which is not necessary for the purposes of inspection, and therefore that it is an unauthorized interference with interstate commerce.

His honor, Judge Seymour, is mistaken in saying the legislature repealed all laws making any substantial diversion of the money to be derived from the tonnage tax on fertilizers to any other purposes than such as were directly or indirectly connected with the expense of inspection.

His honor falls into another serious error in this connection. He says, on page 28 of the record, "certain appropriations are made in unrepealed sections of the Code of North Carolina from the funds of the state board of agriculture for the various purposes, such as that in section 2196 for the salary of an analyst; under section 2198 to the geological museum and under some other sections to various other purposes, but these appropriations are to be paid out of the general funds of the state board of agriculture which are derived from other sources as well as from the tonnage tax on fertilizers, and are not directly appropriated out of the tonnage tax."

His honor thus admits that *these other sections have not been repealed*, but holds that the appropriations are to be paid out of other funds than those arising from the fertilizer tax. *There is absolutely nothing in the law of North Carolina to warrant this latter statement.* The only source of revenue of the department of agriculture is from the fertilizer tax fund—the tonnage tax. The experiment station has no connection with the agricultural department. (See record, page 36) It is conducted under the auspices of the North Carolina College of Agricultural and Mechanic Arts. This college derives its main support from the treasury of the United States, from funds arising from the sale of public lands. The acts of congress upon this subject were passed July 2, 1862, (12 U. S. Stat. at Large, 503) and August 30, 1890, (25 U. S. Stat. at Large, 417) and require the funds granted by them to each state to be applied to the "endowment, support and maintenance of at least one college, where the leading object shall be, without excluding other scientific and classic studies, *and including military tactics*, to teach such branches of learning as are related to agriculture and the mechanic arts in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

By the first subdivision of section 5, "If the act of July 2, 1862, the purchase and establishment of an experiment farm is authorized."

By the act of March 2, 1887, entitled "An Act to establish agricultural experimental stations in connection with the colleges established in the several states, under the provisions of an act approved July 2, 1862, and of the acts supplementary thereto, state agricultural experiment stations at agricultural colleges were established and an annual appropriation of $15,000 to each State from the sale of public lands, was made to support the same. The object and duty of such experiment stations were defined by the said act to be as follows: "To conduct original researches and verify experiments on the physiology of plants and animals; the diseases to which they are severally subject, with the remedies for the same; the chemical composition of useful plants at their different stages of growth; the comparative advantages of rotative cropping as pursued under a varying series of crops; the capacity of new plants or trees for acclimation; the analysis of soils and water; the chemical composition of manures, natural or artificial, with experiments designed to test their comparative effect on crops of different kinds; the adaptation and value of grasses and forage plants; the composition and digestibility of the different kinds of food for domestic animals; the scientific and economic questions involved in the production of butter and cheese; and such other researches or experiments bearing directly on the agricultural industry of the United States, as may in each case be deemed advisable, having due regard to the varying conditions and needs of the respective states or territories. (Act of March 2, 1887.) Supplement to U. S. Rev. St., 1874—1891, vol. I, 2nd Ed., p. 550.

None of the funds so furnished by the United States Government are applicable to the support of the agricultural museum, or the World's Fair at Chicago, or any other of the specific objects which are under the charge of the agricultural department by the state law.

H. M. Cowan, on page 39 of the record, testifies that all of the money which was placed to the credit of the agricultural department arose from the fertilizer tax.

Col. John Robinson, commissioner of agriculture, (record, page 69,) testified:

"Q. From what source is the revenue of the department now derived? A. From the tonnage tax on fertilizer.

Q. Has it any other source of revenue? A. None whatever.

Q. What was its source of revenue before the Act of 1891? A. The license tax on fertilizer." (See, also, record, p. 76, bottom of page, and p. 79).

So that the board of agriculture, which accepted the decision of the United States Court in the case of *American Fertilizer Co.* v. *Board of Agriculture* in such good faith, (?) and hastened to

apply to the legislature of North Carolina for an amendment of the law in order to conform it to the letter and the spirit of the adjudication (?) took no steps to relieve the fertilizer tax fund from all these charges, except in three instances, to wit, the $500 appropriation to the North Carolina Industrial Association; the appropriation to the support of the Agricultural and Mechanical College, and the appropriation to the support of the geological survey. On the contrary, the board of agriculture has diligently expended the proceeds of the fertilizer tax in objects totally foreign to inspection, its effort being to find a way to get rid of the money, which was accumulating on its hands.

SECOND. THE AMENDATORY ACT OF 1891 IS UNCONSTITUTIONAL BECAUSE IT LEVIES AN UNNECESSARY TAX, THAT IS PLAINLY IN EXCESS OF THE NECESSARY EXPENSES OF INSPECTION.

The counsel for the defendants contend that it is not competent for the court to inquire into the good faith of the law or to question its declared purpose; that it was impossible to tell the exact amount necessary for expenses of inspection; that it is exclusively the province of congress and not at all that of the court to declare whether a charge or duty, under an inspection law, is or is not excessive.

For this position the counsel invoke Art. I, sec. 10 of the Constitution, and cite *Neilson* v. *Garza*, 2 Woods., 287.

1. This section of the Constitution refers only to foreign imports and exports, and not to merchandise brought from one state to another. *Woodruff* v. *Parker*, 6 Wall., 823; *Pittsburg Coal Co.* v. *Louisiana*, 156 U. S., 590.

2. The case of *Neilson* v. *Garza* is not in point, as it was a decision in reference to a law providing for the inspection of hides imported into this country from Mexico.

3. If the court cannot inquire into the character of the law in question that imposes a tax of 25 cents a ton, what warrant could there be for such inquiry if the law should exact a tax of $25 a ton?

Our conclusion is, that it is proper for the court to inquire into the character of the law, with a view to determine whether the tax is excessive.

THIRD. THE TAX IS EXCESSIVE.

1. It will be observed that this tax of 25 cents a ton is levied without reference to the number of inspections or analyses that

must or may be made. An importation of 10,000 tons of fertilizer, worth from $100,000 to $150,000, must pay a tax of $2,500, *i. e.* a tax of from 2 to 2½ per cent. Of this importation there may be made only a single inspection and a single analysis.

It appears that in the year 1891 there was received by the department of agriculture, from the source of tonnage tax, the sum of $32,972.96. In the year 1892 the traffic in commercial fertilizers was below the average, as is shown by the testimony. (E. B. Barbee, Record, p. 97.) The year 1891 was an average year. (Record, p. 97.) So that we may take $32,972.76 as the average annual income from this tax. How much of it is absolutely necessary for the purposes of inspection?

2. The excessive character of the tax might have been ascertained in the outset by an examination of the fertilizer inspection laws of sister states.

According to the report of the commissioner of agriculture of Virginia, September 30th, 1890 (see Record, page 111), the appropriation made to the department was $10,000, and the fertilizer law produced $8,100. Out of this, the expenses of carrying out the law were first to be paid. This was $3,034.12, leaving $5,065.88, which went into the treasury in part payment of the appropriation of $10,000. By the law of Virginia, a copy of which is printed in the Record at pages 108–109, there are many other duties of the commissioner of agriculture than that of the inspection and analyzation of fertilizers, the expenses of which are to be paid out of the appropriation of $10,000.

It appears that, in 1891, there was expended in Virginia for analytical work the sum of $4,233.29. (See the Record, p. 114.)

By the report of the commissioner of agriculture of 1893, it appears that, by the Georgia laws on this subject, a tax of ten cents a ton only is imposed for the purpose of inspection, which pays the expense and leaves a surplus. (See Record, p. 102, 104.)

3. What are the proper and legitimate and necessary expenses of inspection in North Carolina?

It seems that the experiment station, which is not connected with, or subject to the control of the department of agriculture, but derives its support under an Act of Congress, (see Dr. Battle's testimony, page 95) employs five chemists at an aggregate salary of $6,700 a year, and that these are engaged upon the analyzation of fertilizers about one-third of their time, perhaps a little more, so that the expenses of chemists in the analyzation of fertilizers amounts to about $2,500. (See Dr. Battle's testimony, Record, p. 88–89.) He says that they expend, in addition to this, $600 per annum on chemicals and apparatus, three-fourths of which is used in fertilizers,

say $450; gas, $350; a man, $600 a year; a clerk for heavy season, $20 a month, 6 months, $120; a stenographer, $35 a month, $420 a year; (unnecessary!) one-half of last four items, $745; making $3,595 chargeable to the department of agriculture for the analysis of fertilizers. For this the board of agriculture, in their zeal to get rid of the fertilizer tax on hand, pays annually $8,000. (See Robinson's testimony, p. 78.)

According to the testimony of this witness the expense of inspection (that is of the inspectors) is $2,398.18. All other expenses of the department are unnecessary and not germane to the inspection expenses. His honor, Judge Seymour, on page 25, in making an estimate of the annual expenses, arrives at $17,352; but he says that some of the items which make up this charge, cannot properly be, as a whole, charged to the inspection of fertilizers. The board and committee meetings, $1,452.62; salaries and wages, $2,175, which includes the curator of the museum and other expenses foreign to the subject-matter, should be cut down to about $1,500, which, added to the $3,595, will make a total expense of $5,095.

This is a liberal estimate.

4. A cursory examination of the accounts will show many items that are not at all necessary to the inspection of fertilizers. For example, the *monthly bulletins.*

The plaintiffs deny the propriety of paying out of the fertilizer tax the cost of publishing bulletins. It may be a very proper thing for the state of North Carolina to issue, at its own expense, bulletins informing the farmers of the relative value of the commercial fertilizers to be purchased by them; but it is no part of the expenses of inspection, and should not be made a burden upon the inspection tax. These bulletins constitute a vehicle for the communication of many interesting treatises from the commissioner and others to the farmers of the state upon general agricultural subjects. For example, the August, 1891, bulletin of 12 pages contained only 5 pages with reference to the analyzation of fertilizers. The rest of it was devoted to articles on "Thoroughbred Cows," "State Veterinarian Needed," "The Situation of Farmers," "The Castor Bean," "What it Costs to Grow Cotton," "Farming that Pays," "Articles on Country Roads," and "Diversity Good Economy." (The record, p. 73.) The bulletin of February, 1893, contains 20 pages, only six of which are devoted to the reports of analyses and four to the registration of fertilizers, and ten pages to miscellaneous matter. The registration of fertilizers has nothing to do with the inspection or analysis. The bulletin of March, 1893, of ten pages, contains five pages on the reports of registration of fertilizers and only three pages on the analyzation of fertilizers. The bulle-

tin of April, 1892, contains sixteen pages, only five pages of which are devoted to the analysis of fertilizers. The bulletin of August, 1892, is eighteen pages long, and contains not one upon the subject of the analyzation of fertilizers. It gives an account of the resources of the state. The bulletin of September, 1892, contains only one page devoted to registration and none to the analysis of fertilizers. The bulletin of February, 1892, contains twelve pages, and contains only six pages devoted to the analyzation of fertilizers. The bulletin of April, 1891, contains eight pages, three pages of which are devoted to analyzation and three to registration, and the balance to other matters. The bulletin of June, 1891, contains ten pages, only two pages being devoted to analyzation. The bulletin of July, 1891, contains four pages, with no reference to analyzation. (Record, p. 76.) August, 1891, bulletin contains fourteen pages, with no reference to the analyzation of fertilizers. October, 1891, bulletin, eight pages, none of which are devoted to the analyzation of fertilizers. November, 1891, bulletin contains twelve pages, with no portion devoted to the analyzation of fertilizers. This is taken up with a report of the inter-states exposition of 1891. (See record.)

The total items for *paper* in the two years mentioned, amount to $1,288.31; *printing* amounts to $1,045.23; *blanks* of different kinds amout to $1,205; *legal expenses* amount to $691.85; *postage* account for 1891 and 1892, $951.11; and all these besides the *World's Fair appropriation* of $9,000 and the *salary* of the secretary of the board, while attending World's Fair, $1,300; and World's Fair additional, $300; *curator of museum*, $900 a year; and *insurance* on state buildings, a portion of which are used by the agricultural department, $670.66. (See Record, p. 79.) It is incredible that any portion of these expenditures were necessary in the legitimate inspection of fertilizers.

Besides all this, the extravagant charge for the commissioner and his large board of agriculture is not at all necessary for the simple work inspection and analysis of fertilizers.

Upon a review of the testimony, therefore, it is plain that the levy of twenty-five cents a ton was unreasonable and excessive.

FOURTH. THE COURT MUST MAKE THIS INQUIRY.

It is necessary for the court to make this inquiry, or else in every case, however excessive the amount of the levy made, it must assume that the tax is reasonable, and that it was fixed by the legislature in good faith for the purposes of inspection only. In other words, the court must close its eyes to all evidence *aliunde*, and be bound by the declarations of the state legislature!

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is, or is not, repugnant to the Constitution of the United States.

Minnesota *v.* Barber, 136 U. S., 313.

FIFTH. REVIEW OF SOME OF THE AUTHORITIES CITED BY THE DEFENDANTS.

Railroad v. *Gibbs*, 143 U. S., is cited in defendants' brief. In this case it was held that the tax levied upon railroad companies to pay the necessary expenses of a railroad commission was not unconstitutional. But this was an entirely different question from that under consideration. It was not considered in the Gibbs case whether a levy for inspection purposes was an interference with inter-state commerce by reason of its being excessive and unnecessary for the purposes of inspection, nor whether, under the police power of a state, such a tax could be levied.

The case of *Van Meter* v. *Spurrier*, 94 Ky., 22, is cited. In this case for each analysis, a sum of $15 is charged, and $1 per hundred is charged for labels. The court declares that the fees collected by the director for analyzing and fixing a certificate can only be used for that purpose. In this case, however, there are no authorities cited, and besides, it is but a state decision.

The counsel for defendants seem to lay some stress upon the fact that the statute under consideration affects the citizens and manufacturers of North Carolina as well as the citizens of other states. This is not decisive of the point in issue. The drummers' tax law was held unconstitutional, but it applied to citizens of the state as well as drummers from other states.

"Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to the citizens of all states, including Virginia, for "a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute."

Minn. *v.* Barber, 136 U. S., 313.
Robbins *v.* Shelby Tax District, 120 U. S., 489, 497.
Brimmer *v.* Rebman, 138 U. S., 82.
See, also, in *re.* Spain, 47 Fed. Rep., 208.
Ex parte Houch, 29 Fed. Rep., 330.
Fisklen *v.* Taxing District of Shelby Co., 145 U. S., 1.

Much is said in the brief about the necessity for the protection of the people of North Carolina from fraud and imposition. If the tax were confined to spurious fertilizers, there might be less ground for complaint. An examination of the analyses as published shows that none of the fertilizers analyzed are spurious and nearly all of them contain the valuable ingredients, in quantities as claimed, which go to constitute a commercial fertilizer, and but very few fall under their claims, and these in scarcely an appreciable degree.

The defendants, on page 15 of their brief, seem to admit that the state law can act upon an import only after it has become mingled with the general property of the state, except so far as may be necessary to insure safety in the disposition of the import until it is thus mingled. For example, in order to protect life and property, a state undoubtedly has the right to exercise the necessary authority to require a car of dynamite or gunpowder to be so handled and so deposited as to minimize danger. This, however, is a very different question from that of authority to interfere with the importation of some article of trade, not affecting the health, morals or safety of the community, which, though a genuine article, may turn out to be worth less than claimed. In other words, it can scarcely be contended that the expense of inspection may be saddled upon persons engaged in interstate commerce simply for the purpose of advising purchasers in the state how they may purchase to the greatest advantage and made the best bargains.

The case of *Plumley* v. *Massachusetts*, 155 U. S., 461, is cited. This case may be easily distinguished from the present one. This court upheld a statute of the state of Massachusetts to prevent deception in the manufacture and sale of imitation butter. This statute *forbade the sale of deceitful* imitations of this article of food. But the court in *Plumley* v. *Massachusetts* would hardly have upheld a tax of a cent a pound upon genuine butter as well as oleomargerine for the purpose of paying the expenses of the inspection and detection of the latter. The validity of an inspection law or the excessive character of the inspection tax did not come in question in the case.

SIXTH. THE ACT IN QUESTION CANNOT BE SUSTAINED UNDER THE POLICE POWER OF THE STATE.

The defendants' counsel fail to cite any case to support their contention. The police power cannot be exercised with reference to interstate commerce simply to enable a citizen to make judicious purchases of fertilizers. While there are some expres-

sions in a few of the decisions which seem to indicate that under the police power a state may legislate so as to increase its industries, develope its resources, and add to its wealth and prosperity, they are but *obiter dicta*, and there is no case in which this court has held such laws constitutional unless they were passed for the purpose of promoting the social order, health and morals of its people.

Thus Chancellor Kent mentions "unwholesome trades, slaughter-houses, operations offensive the senses, the deposit of powder and application of steam power to propel cars, the building with combustible materials, and the burial of the dead," as examples of legitimate subjects for state regulation under the police power.

Lewis' Fed. Power over Commerce, 103.

"It is unfortunate that in describing police legislation judges frequently speak, not only of the health and morals but the welfare of society. If "welfare" is a general name for the first two objects then it is a useless repetition; if it is used in its broad sense, "denoting the good of mankind," police laws might in theory cover every act of the legislature. This would destroy the very act of separating the police powers from the mass of legislation reserved to the states, viz., that certain special rules should be applied when we examine the question of their constitutionality. And, we may observe that, notwithstanding the numerous dicta to the effect that the police powers included all those laws passed for the welface of society the actual decisions have never extended the term beyond the public health and public safety. Thus, in *Chy Lung* v. *Freeman et al.*, 92 U. S., 275, a law of the state of California professedly to preserve the health of the citizens, which practically excluded immigrants from China, though undoubtedly for the "welfare" of the state, was declared unconstitutional. And a law which regulated the delivery of telegrams received from or sent to points in other states, though upheld by the courts of Indiana as a police regulation, was declared void by the supreme court of the United States."

Ibid, 103.

"In *Powell* v. *Penna*, 127 U. S, 695, the Court seems to have given a more extended meaning to police legislation. We cannot but think that the dicta in that case will not be sustained. The state had prohibited the manufacture and sale of oleomargarine. Powell was indicted for such sale. It was notorious that this law was passed in the interest of the dairymen, and that oleomargarine properly made was not in the least deleterious to public health. The state's right to prohibit the manufacture is undoubted, but we should not call it the exercise of a police power simply because the legislature has stated its ob-

ject to be the perservation of the health of the community. All drinking on account of the example to others may, perhaps, reasonably be considered as detrimental to the public health, but it illustrates the utmost limit to which we can carry this kind of argument. To call the eating of sound butter, because it does not happen to be made from the milk of a cow, detrimental to the health of the community, is absurd."

Lewis' Fed. Power over Commerce, 104.

"If the intention of the members of the legislature was solely to benefit the health or morals of the community, but the act in its evident operation goes beyond what is absolutely necessary for this end, at the same time deals with matters and things not under the control of the state, it is void."

Ibid, p. 106.

"The three cases of *Bowman* v. *Chicago*, *Leisey* v. *Hardin*, and *in re* Rahrer, have done more to clear the intricate subject of the federal power over commerce and its effect on state action than any other cases ever decided by the supreme court. They put beyond all question the fact that the power over interstate and foreign commerce is exclusively in congress, and that no exception will be made of the police legislation of the states." *Ibid.*, 123.

"Undoubtedly this power of the state extends to all regulations, affecting not only the health but the good order, morals and safety of society; but a law does not necessarily fall under the class of police regulations, because it is passed under the pretense of such regulation, as in this case, by a false title, purporting to protect the health and prevent the adulteration of dairy products and fraud in the sale thereof. It must have in its provisions some relation to the end to be accomplished. If that which is forbidden is not injurious to the health or morals of the people, if it does not disturb their peace or menace their safety, it derives no validity by calling it a police or health law; whatever name it may receive, it is nothing less than an unwarranted interference with the rights and liberties of a citizen."

Powell v. *Penn.*, 127 U. S., 695.

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, as is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

Mugler *v.* Kansas, 123 U. S., 623, 661.

"The police power extends to such legislation as is required to protect the comfort, health and lives of all persons within the jurisdiction of the state and also to care for the property located within the same. It justifies the adoption of regulations to prevent the commission of crime, and the spreading of disease. It authorizes rules for the suppression of vice and of various kinds of social evils, for the prohibition of lotteries, gambling, and nuisances. Whatever this power may include, I think, it is clear that it does not embrace a subject confided by the constitution exclusively to congress."

R. R. Co. *v.* Husen, 95 U. S., 259.
Crutcher *v.* Kentucky, 141 U. S., 47.

"By the settled doctrines of this court, the police power extends at least to the protection of the lives, the health and property of the community against the injurious exercise by a citizen of his own right."

Patterson *v.* Ky., 97 U. S., 504.

"It extends to the protection of the lives, limbs, comfort and quiet of all persons, and may exclude from introduction into the state contagious and infectious diseases; may make inspection laws, and may exclude or prevent the introduction of criminals, convicts, paupers, idiots, lunatics and others likely to become a burden or public charge, so far as it may be exercised without interfering with the power of congress over the subject of commerce hereinbefore referred to.

Lessey *v.* Hardin, 135 U. S., 100.
O'Neil *v.* Vermont, 144 U. S., 223.
Bowman *v.* Railway Company, 125 U. S., 465.
Butchers' Union Co. *v.* Crescent Co., 111 U. S., 746.
Munn *v.* Illinois, U. S., 113.
Budd *v.* New York, 143 U. S., 517.

Plumby v. *Massachusetts, supra*, is a case where a statute was sustained under the police power of the state, because it was promotive of the *health* of the community. The public were protected against the introduction and sale of a spurious article of food.

SEVENTH. BY FAILURE TO DISCUSS OR REAFFIRM ALL THE POSITIONS TAKEN IN OUR FIRST BRIEF, WE DO NOT WISH TO BE UNDERSTOOD AS ABANDONING ANY OF THEM.

THOS. N. HILL,
JOHN W. HINSDALE,
Solicitors for Complainants and Appellants.

RALEIGH, N. C., May 14th, 1896.

No. 311. Oct. Term, 1895.

Second Reply Brief of Appellant.

Filed May 20, 1896.

SUPREME COURT OF THE UNITED STATES.

No. 311.

THE PATAPSCO GUANO COMPANY, APPELLANT,

versus

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, W. R. WILLIAMS, *et al.*, APPELLEES.

BRIEF IN REPLY

OF

THOS. N. HILL AND JNO. W. HINSDALE,

COUNSEL FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 311.

THE PATAPSCO GUANO COMPANY, APPELLANT,

versus

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, W. R. WILLIAMS *et al.*, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF IN REPLY OF COUNSEL FOR APPELLANT.

FIRST. THE ACT OF JANUARY 21ST, 1891 (PUBLIC LAWS OF 1891, CH. 9), ENTITLED AN ACT TO AMEND CHAPTER 1, VOLUME 2, OF THE CODE, RELATING TO AGRICULTURE AND GEOLOGY, IS UNCONSTITUTIONAL UPON ITS FACE.

This act must be read in connection with the other statutes *in pari materia*. It undertakes to make certain specific amendments to certain sections in the chapter of The Code relating to agriculture and geology. The presumption is that the legislature did not intend to amend the other sections of the chapter which are not mentioned in the amendatory act, and it would be a strained construction to hold that section 10 of the amendatory act, which provides that all laws and clauses of laws in conflict with this act are hereby repealed, was intended to repeal those sections of the said chapter which were not mentioned. His honor Judge Seymour takes this view. (See record, p. 28.)

It is true the Act of 1891 declares that, "for the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing materials in this state, there shall be a charge of twenty-five cents per ton;" but the act does not declare that this is the only purpose; and under the uniform construction of the law by the board of agriculture and the

attorney general of the state, the funds arising from this tax have been appropriated to the other purposes authorized by law.

An examination of chapter 1, volume 2 of The Code, will disclose the fact that the board of agriculture is charged with the maintenance and support of the following objects:

1. An analyst, whose duty it shall be not only to analyze fertilizers, but also to carry on experiments on the nutrition and growth of plants and such other investigations as the department may direct. See Vol. II, Code, sec. 2196. He is also to make analyses for purposes connected with the hygienic duties of the superintendent of health. Such analyses shall include soil, drinking water and articles of food. (See Code, sec. 2197.) His salary is expressly made payable out of the funds of the department of agriculture. This section is specially amended by the Act of 1891, and therefore is not repealed by this act.

2. Section 2198 of The Code provides that the state geologist may have all his marls, soils, minerals and other products analyzed by the state chemist at the laboratory of the department free of charge, and the board of agriculture is hereby expressly authorized to pay the necessary expenses of the geological museum, and they may authorize and supervise the publication of the second volume of the Geology of North Carolina. This section is not repealed, but is expressly amended by the Act of 1891. Thus an analyst is to be employed for other purposes than the inspection of fertilizers, and he is to be paid out of the funds of the department of agriculture, which are derived solely from the so-called inspection tax, and these funds are thus diverted from their proper application.

The defendants contend (see brief, page 5,) that the fertilizer tax fund is relieved from the appropriation for the support of the *geological survey*. This is admitted, but it is the only expenditure in this connection of which the board of agriculture has been relieved. Section 2198 has not been repealed or amended in any other respect, and the board of agriculture has accordingly continued to expend the funds arising from the fertilizer tax in the support and maintenance of the geological museum. The curator's salary of $900 per annum (see record, p. 69) is not otherwise provided for.

3. The department of agriculture is directed by section 2199 to prepare hand-books with maps, containing all necessary information in regard to the mines, minerals, forests, etc., and statistics for immigrants, and make illustrative expositions of the attractions of the state whenever practicable at international exhibitions, and to offer premiums for the encouragement of agricultural and mechanical pursuits, and the raising of improved livestock in this state.

This section was left untouched upon the Act of 1891, and the board of agriculture have accordingly, under warrant of this law, and under the advice of the attorney general (printed record, pp. 84, 85, 86) appropriated $9,000 to make an exhibit of North Carolina's resources at the World's Fair at Chicago (record, p. 40); $1,300 to the Secretary, who devoted an entire year to the World's Fair work; and in addition to this the board appropriated $300 more to the same work. (See record, p. 79.) All this came out of the fertilizer tax fund.

Feeling the force of this appropriation, the defendants at first pretended that it was nothing but a loan. (See bill of complaint, p. 17.) But when confronted with the records of the board (record, pp. 81 and 84), they admit it to be an appropriation, and make a weak excuse for having solemnly represented it to be a loan in their sworn answer.

4. Section 2200 authorizes the department to employ immigration agents in foreign countries. There is no provision of law for paying them except out of the fertilizer tax.

5. Section 2201 of The Code provides for establishing and keeping a general land and mining registry at the expense of the department. This has never been repealed.

6. Sec. 2206 provides for the annual appropriation of $500 for the North Carolina Industrial Association. The plaintiff contends that this appropriation has not been repealed. (See former brief, p. 58, where the question of repeal is discussed.)

7. The $5,000 annual appropriation to the N. C. College of Agriculture and Mechanic Arts is still in force. Acts 1885, ch. 308, Acts 1887, ch. 418 (see former brief, p. 58).

For what purpose defendants' counsel cite chapter 338 of the Acts of 1891, in regard to the oyster interests, is not perceived, as the department was never charged with any burden in respect to these interests.

The defendants argue that the legislature must have intended to repeal all of the laws appropriating the funds of the agricultural department to other objects, because it tried to do so in the three instances named, to-wit, the appropriation to the N. C. Industrial Association, to the N. C. Agricultural College, and to the geological survey; but if by any mishap it has failed to accomplish its purpose, the court is asked to take the will for the deed and to hold that the fertilizer tax law is constitutional. We submit that the legislature must be presumed to have done exactly what it did, nothing more, nothing less; and if there is a single object to which the fertilizer tax is still to be applied, other than the necessary expenses of inspection, it must be conclusively presumed that the legislature intended such application.

If the law authorizes the diversion of a single dollar of the fertilizer tax to purposes foreign to the necessary expenses of inspection, the irresistible conclusion is that a tax has been levied which is not necessary for the purposes of inspection, and therefore that it is an unauthorized interference with interstate commerce.

His honor, Judge Seymour, is mistaken in saying the legislature repealed all laws making any substantial diversion of the money to be derived from the tonnage tax on fertilizers to any other purposes than such as were directly or indirectly connected with the expense of inspection.

His honor falls into another serious error in this connection. He says, on page 28 of the record, "certain appropriations are made in unrepealed sections of the Code of North Carolina from the funds of the state board of agriculture for the various purposes, such as that in section 2196 for the salary of an analyst; under section 2198 to the geological museum and under some other sections to various other purposes, but these appropriations are to be paid out of the general funds of the state board of agriculture which are derived from other sources as well as from the tonnage tax on fertilizers, and are not directly appropriated out of the tonnage tax."

His honor thus admits that *these other sections have not been repealed*, but holds that the appropriations are to be paid out of other funds than those arising from the fertilizer tax. *There is absolutely nothing in the law of North Carolina to warrant this latter statement.* The only source of revenue of the department of agriculture is from the fertilizer tax fund—the tonnage tax. The experiment station has no connection with the agricultural department. (See record, page 36.) It is conducted under the auspices of the North Carolina College of Agricultural and Mechanic Arts. This college derives its main support from the treasury of the United States, from funds arising from the sale of public lands. The acts of congress upon this subject were passed July 2, 1862, (12 U. S. Stat. at Large, 503) and August 30, 1890, (25 U. S. Stat. at Large, 417) and require the funds granted by them to each state to be applied to the "endowment, support and maintenance of at least one college, where the leading object shall be, without excluding other scientific and classic studies, *and including military tactics*, to teach such branches of learning as are related to agriculture and the mechanic arts in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

By the first subdivision of section 5, "If the act of July 2, 1862, the purchase and establishment of an experiment farm is authorized."

By the act of March 2, 1887, entitled "An Act to establish agricultural experimental stations in connection with the colleges established in the several states, under the provisions of an act approved July 2, 1862, and of the acts supplementary thereto, state agricultural experiment stations at agricultural colleges were established and an annual appropriation of $15,000 to each State from the sale of public lands, was made to support the same. The object and duty of such experiment stations were defined by the said act to be as follows: "To conduct original researches and verify experiments on the physiology of plants and animals; the diseases to which they are severally subject, with the remedies for the same; the chemical composition of useful plants at their different stages of growth; the comparative advantages of rotative cropping as pursued under a varying series of crops; the capacity of new plants or trees for acclimation; the analysis of soils and water; the chemical composition of manures, natural or artificial, with experiments designed to test their comparative effect on crops of different kinds; the adaptation and value of grasses and forage plants; the composition and digestibility of the different kinds of food for domestic animals; the scientific and economic questions involved in the production of butter and cheese; and such other researches or experiments bearing directly on the agricultural industry of the United States, as may in each case be deemed advisable, having due regard to the varying conditions and needs of the respective states or territories. (Act of March 2, 1887.) Supplement to U. S. Rev. St., 1874—1891, vol. I, 2nd Ed., p. 550.

None of the funds so furnished by the United States Government are applicable to the support of the agricultural museum, or the World's Fair at Chicago, or any other of the specific objects which are under the charge of the agricultural department by the state law.

H. M. Cowan, on page 39 of the record, testifies that all of the money which was placed to the credit of the agricultural department arose from the fertilizer tax.

Col. John Robinson, commissioner of agriculture, (record, page 69,) testified:

"Q. From what source is the revenue of the department now derived? A. From the tonnage tax on fertilizer.

Q. Has it any other source of revenue? A. None whatever.

Q. What was its source of revenue before the Act of 1891? A. The license tax on fertilizer." (See, also, record, p. 76, bottom of page, and p. 79).

So that the board of agriculture, which accepted the decision of the United States Court in the case of *American Fertilizer Co.* v. *Board of Agriculture* in such good faith, (?) and hastened to

apply to the legislature of North Carolina for an amendment of the law in order to conform it to the letter and the spirit of the adjudication (?) took no steps to relieve the fertilizer tax fund from all these charges, except in three instances, to wit, the $500 appropriation to the North Carolina Industrial Association; the appropriation to the support of the Agricultural and Mechanical College, and the appropriation to the support of the geological survey. On the contrary, the board of agriculture has diligently expended the proceeds of the fertilizer tax in objects totally foreign to inspection, its effort being to find a way to get rid of the money, which was accumulating on its hands.

SECOND. THE AMENDATORY ACT OF 1891 IS UNCONSTITUTIONAL BECAUSE IT LEVIES AN UNNECESSARY TAX, THAT IS PLAINLY IN EXCESS OF THE NECESSARY EXPENSES OF INSPECTION.

The counsel for the defendants contend that it is not competent for the court to inquire into the good faith of the law or to question its declared purpose; that it was impossible to tell the exact amount necessary for expenses of inspection; that it is exclusively the province of congress and not at all that of the court to declare whether a charge or duty, under an inspection law, is or is not excessive.

For this position the counsel invoke Art. I, sec. 10 of the Constitution, and cite *Neilson* v. *Garza*, 2 Woods., 287.

1. This section of the Constitution refers only to foreign imports and exports, and not to merchandise brought from one state to another. *Woodruff* v. *Parker*, 6 Wall., 823; *Pittsburg Coal Co.* v. *Louisiana*, 156 U. S., 590.

2. The case of *Neilson* v. *Garza* is not in point, as it was a decision in reference to a law providing for the inspection of hides imported into this country from Mexico.

3. If the court cannot inquire into the character of the law in question that imposes a tax of 25 cents a ton, what warrant could there be for such inquiry if the law should exact a tax of $25 a ton?

Our conclusion is, that it is proper for the court to inquire into the character of the law, with a view to determine whether the tax is excessive.

THIRD. THE TAX IS EXCESSIVE.

1. It will be observed that this tax of 25 cents a ton is levied without reference to the number of inspections or analyses that

must or may be made. An importation of 10,000 tons of fertilizer, worth from $100,000 to $150,000, must pay a tax of $2,500, *i. e.* a tax of from 2 to 2½ per cent. Of this importation there may be made only a single inspection and a single analysis.

It appears that in the year 1891 there was received by the department of agriculture, from the source of tonnage tax, the sum of $32,972.96. In the year 1892 the traffic in commercial fertilizers was below the average, as is shown by the testimony. (E. B. Barbee, Record, p. 97.) The year 1891 was an average year. (Record, p. 97.) So that we may take $32,972.76 as the average annual income from this tax. How much of it is absolutely necessary for the purposes of inspection?

2. The excessive character of the tax might have been ascertained in the outset by an examination of the fertilizer inspection laws of sister states.

According to the report of the commissioner of agriculture of Virginia, September 30th, 1890 (see Record, page 111), the appropriation made to the department was $10,000, and the fertilizer law produced $8,100. Out of this, the expenses of carrying out the law were first to be paid. This was $3,034.12, leaving $5,065.88, which went into the treasury in part payment of the appropriation of $10,000. By the law of Virginia, a copy of which is printed in the Record at pages 108–109, there are many other duties of the commissioner of agriculture than that of the inspection and analyzation of fertilizers, the expenses of which are to be paid out of the appropriation of $10,000.

It appears that, in 1891, there was expended in Virginia for analytical work the sum of $4,233.29. (See the Record, p. 114.)

By the report of the commissioner of agriculture of 1893, it appears that, by the Georgia laws on this subject, a tax of ten cents a ton only is imposed for the purpose of inspection, which pays the expense and leaves a surplus. (See Record, p. 102, 104.)

3. What are the proper and legitimate and necessary expenses of inspection in North Carolina?

It seems that the experiment station, which is not connected with, or subject to the control of the department of agriculture, but derives its support under an Act of Congress, (see Dr. Battle's testimony, page 95) employs five chemists at an aggregate salary of $6,700 a year, and that these are engaged upon the analyzation of fertilizers about one-third of their time, perhaps a little more, so that the expenses of chemists in the analyzation of fertilizers amounts to about $2,500. (See Dr. Battle's testimony, Record, p. 88–89.) He says that they expend, in addition to this, $600 per annum on chemicalsand apparatus, three-fourths of which is used in the analysis of fertili-

zers, say $450; gas, $350; a man, $600 a year; a clerk for heavy season, $20 a month, 6 months, $120; a stenographer, $35 a month, $420 a year; (unnecessary!) one-half of last four items, $745; making $3,595 chargeable to the department of agriculture for the analysis of fertilizers. For this the board of agriculture, in their zeal to get rid of the fertilizer tax on hand, pays annually $8,000. (See Robinson's testimony, p. 78.)

According to the testimony of this witness the expense of inspection (that is of the inspectors) is $2,398.18. All other expenses of the department are unnecessary and not germane to the inspection expenses. His honor, Judge Seymour, on page 25, in making an estimate of the annual expenses, arrives at $17,352; but he says that some of the items which make up this charge, cannot properly be, as a whole, charged to the inspection of fertilizers. The board and committee meetings, $1,452.62; salaries and wages, $2,175, which includes the curator of the museum and other expenses foreign to the subject-matter, should be cut down to about $1,500, which, added to the $3,595, will make a total expense of $5,095.

This is a liberal estimate.

4. A cursory examination of the accounts will show many items that are not at all necessary to the inspection of fertilizers. For example, the *monthly bulletins.*

The plaintiffs deny the propriety of paying out of the fertilizer tax the cost of publishing bulletins. It may be a very proper thing for the state of North Carolina to issue, at its own expense, bulletins informing the farmers of the relative value of the commercial fertilizers to be purchased by them; but it is no part of the expenses of inspection, and should not be made a burden upon the inspection tax. These bulletins constitute a vehicle for the communication of many interesting treatises from the commissioner and others to the farmers of the state upon general agricultural subjects. For example, the August, 1891, bulletin of 12 pages contained only 5 pages with reference to the analyzation of fertilizers. The rest of it was devoted to articles on "Thoroughbred Cows," "State Veterinarian Needed," "The Situation of Farmers," "The Castor Bean," "What it Costs to Grow Cotton," "Farming that Pays," "Articles on Country Roads," and "Diversity Good Economy." (The record, p. 73.) The bulletin of February, 1893, contains 20 pages, only six of which are devoted to the reports of analyses and four to the registration of fertilizers, and ten pages to miscellaneous matter. The registration of fertilizers has nothing to do with the inspection or analysis. The bulletin of March, 1893, of ten pages, contains five pages on the reports of registration of fertilizers and only three pages on the analyzation of fertilizers. The bulle-

tin of April, 1892, contains sixteen pages, only five pages of which are devoted to the analysis of fertilizers. The bulletin of August, 1892, is eighteen pages long, and contains not one upon the subject of the analyzation of fertilizers. It gives an account of the resources of the state. The bulletin of September, 1892, contains only one page devoted to registration and none to the analysis of fertilizers. The bulletin of February, 1892, contains twelve pages, and contains only six pages devoted to the analyzation of fertilizers. The bulletin of April, 1891, contains eight pages, three pages of which are devoted to analyzation and three to registration, and the balance to other matters. The bulletin of June, 1891, contains ten pages, only two pages being devoted to analyzation. The bulletin of July, 1891, contains four pages, with no reference to analyzation. (Record, p. 76.) August, 1891, bulletin contains fourteen pages, with no reference to the analyzation of fertilizers. October, 1891, bulletin, eight pages, none of which are devoted to the analyzation of fertilizers. November, 1891, bulletin contains twelve pages, with no portion devoted to the analyzation of fertilizers. This is taken up with a report of the inter-states exposition of 1891. (See record.)

The total items for *paper* in the two years mentioned, amount to $1,288.31; *printing* amounts to $1,045.23; *blanks* of different kinds amout to $1,205; *legal expenses* amount to $691.85; *postage* account for 1891 and 1892, $951.11; and all these besides the *World's Fair appropriation* of $9,000 and the *salary* of the secretary of the board, while attending World's Fair, $1,300; and World's Fair additional, $300; *curator of museum*, $900 a year; and *insurance* on state buildings, a portion of which are used by the agricultural department, $670.66. (See Record, p. 79.) It is incredible that any portion of these expenditures were necessary in the legitimate inspection of fertilizers.

Besides all this, the extravagant charge for the commissioner and his large board of agriculture is not at all necessary for the simple work inspection and analysis of fertilizers.

Upon a review of the testimony, therefore, it is plain that the levy of twenty-five cents a ton was unreasonable and excessive.

FOURTH. THE COURT MUST MAKE THIS INQUIRY.

It is necessary for the court to make this inquiry, or else in every case, however excessive the amount of the levy made, it must assume that the tax is reasonable, and that it was fixed by the legislature in good faith for the purposes of inspection only. In other words, the court must close its eyes to all evidence *aliunde*, and be bound by the declarations of the state legislature!

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is, or is not, repugnant to the Constitution of the United States.

Minnesota *v.* Barber, 136 U. S., 313.

FIFTH. REVIEW OF SOME OF THE AUTHORITIES CITED BY THE DEFENDANTS.

Railroad v. *Gibbes*, 142 U. S., is cited in defendants' brief. In this case it was held that the tax levied upon railroad companies to pay the necessary expenses of a railroad commission was not unconstitutional. But this was an entirely different question from that under consideration. It was not considered in the Gibbs case whether a levy for inspection purposes was an interference with inter-state commerce by reason of its being excessive and unnecessary for the purposes of inspection, nor whether, under the police power of a state, such a tax could be levied.

The case of *Van Meter* v. *Spurrier*, 94 Ky., 22, is cited. In this case for each analysis, a sum of $15 is charged, and $1 per hundred is charged for labels. The court declares that the fees collected by the director for analyzing and fixing a certificate can only be used for that purpose. In this case, however, there are no authorities cited, and besides, it is but a state decision.

The counsel for defendants seem to lay some stress upon the fact that the statute under consideration affects the citizens and manufacturers of North Carolina as well as the citizens of other states. This is not decisive of the point in issue. The drummers' tax law was held unconstitutional, but it applied to citizens of the state as well as drummers from other states.

"Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to the citizens of all states, including Virginia, for "a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute."

Minn. *v.* Barber, 136 U. S., 313.
Robbins *v.* Shelby Tax District, 120 U. S., 489, 497.
Brimmer *v.* Rebman, 138 U. S., 82.
See, also, in *re.* Spain, 47 Fed. Rep., 208.
Ex parte Houch, 29 Fed. Rep., 330.
Fisklen *v.* Taxing District of Shelby Co., 145 U. S., 1.

Much is said in the brief about the necessity for the protection of the people of North Carolina from fraud and imposition. If the tax were confined to spurious fertilizers, there might be less ground for complaint. An examination of the analyses as published shows that none of the fertilizers analyzed are spurious and nearly all of them contain the valuable ingredients, in quantities as claimed, which go to constitute a commercial fertilizer, and but very few fall under their claims, and these in scarcely an appreciable degree.

The defendants, on page 15 of their brief, seem to admit that the state law can act upon an import only after it has become mingled with the general property of the state, except so far as may be necessary to insure safety in the disposition of the import until it is thus mingled. For example, in order to protect life and property, a state undoubtedly has the right to exercise the necessary authority to require a car of dynamite or gunpowder to be so handled and so deposited as to minimize danger. This, however, is a very different question from that of authority to interfere with the importation of some article of trade, not affecting the health, morals or safety of the community, which, though a genuine article, may turn out to be worth less than claimed. In other words, it can scarcely be contended that the expense of inspection may be saddled upon persons engaged in interstate commerce simply for the purpose of advising purchasers in the state how they may purchase to the greatest advantage and made the best bargains.

The counsel for the defendants, on page 17 of their brief, say: "In all the cases, so far as we are aware, in which inspection laws of the states have been under consideration by the court, the question has been, not as to whether the inspection charges were excessive, but whether they were a mere cover for laying revenue duties;" and for this they cite:

Soon Hing *v.* Crowley, 113 U. S., 703, at p. 710.
Mugler *v.* Kansas, 123 U. S., 623, at p. 661.
People *v.* Compagnie Generale, etc., 107 U. S., 59 at p. 63.
Minnesota *v.* Barber, 136 U. S., 313, at p. 319.

In the case of *Soon Hing* v. *Crowly*, *supra*, like that of *Barbier* v. *Connolly*, 113 U. S., 27, an ordinance of the municipality of San Francisco recited that the indiscriminate establishment of public laundries and wash-houses endangered the public health and public safety, and made it unlawful to carry on this business within certain designated limits of the city and county, without having first obtained a health certificate of the health officer of the municipality, after an inspection by him without charge for the services rendered, and forbade such business be-

tween the hours of ten in the evening and six in the morning. The court sustained the ordinance, saying on page 708 of the opinion: "It is of the utmost consequence in a city subject, as San Francisco is, the greater part of the year to high winds, and composed principally within the limits designated of wooden buildings, that regulations of a strict character should be adopted to prevent the possibility of fires. That occupations in which continuous fires are necessary should cease at certain hours of the night would seem to be, under such circumstances, a reasonable regulation as a measure of precaution."

No inspection fee of any amount was here exacted.

In *Mugler* v. *Kansas, supra*, the court held that state legislation, which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the state, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the constitution of the United States, or by the amendments thereto; and that the prohibition by the state of Kansas in its constitution and laws of the manufacture or sale within the limits of the state of intoxicating liquors for general use there as a beverage, is fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits, and is not subject to the objection that, under the guise of police regulations, the state is aiming to deprive the citizen of his constitutional rights.

Mr. Justice Harlan, delivering the opinion of the court, said:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of the statute, *Sinking Fund Cases*, 99 U. S., 700, 718, the courts must obey the Constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it is said in *Marbury* v. *Madison*, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the

limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

No inspection tax was levied by the statute under consideration.

In *People* v. *Compagnie Generale Tranatlantique, supra,* this court held that a statute of New York imposing a tax on every alien passenger who shall come by vessel from a foreign country to the port of New York, and holding the vessel liable for the tax, is a regulation of foreign commerce, and is void, and that the statute is not relieved from this constitutional objection by declaring in its title that it is to raise money for the execution of the inspection laws of the state, which authorize passengers to be inspected in order to determine who are criminals, paupers, lunatics, orphans, or infirm persons, without means or capacity to support themselves and subject to become a public charge, as such facts are not to be ascertained by inspection alone.

This Court held that the statute under consideration was not in any sense an inspection law. So the case is not in point.

In *Minnesota* v. *Barber. supra,* it was decided that the statute of Minnesota entitled "An act for the protection of the public health by providing for inspection, before the slaughtering, of cattle, sheep and swine designed for slaughter for human food," is unconstitutional and void in so far as it requires, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb or pork, for human food, that the animals, from which such meats are taken, shall have been inspected in that state before being slaughtered.

A burden imposed upon inter-state commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting it.

There was no inspection fee whatever exacted in this case.

It will be observed that in none of these cases did the court have under consideration whether certain inspection charges were a mere cover for laying revenue duties.

SIXTH. THE ACT IN QUESTION CANNOT BE SUSTAINED UNDER THE POLICE POWER OF THE STATE.

The defendants' counsel fail to cite any case which supports their contention. The police power cannot be exercised with refer-

ence to interstate commerce simply to enable a citizen to make judicious purchases of fertilizers. While there are some expressions in a few of the decisions which seem to indicate that under the police power a state may legislate "so as to increase its industries, develope its resources, and add to its wealth and prosperity," they are but *obiter dicta*, and there is no case in which this court has held such laws constitutional unless they were passed for the purpose of promoting the social order, health and morals of the people.

The counsel cites in support of their position the following cases:

Barbier *v.* Connolly, 113 U. S., 27, 31.
Beer Co. *v.* Massachusetts, 97 U. S., 25.
Leisy *v.* Hardin, 135 U. S., 129.
Morgan *v.* Louisiana, 118 U. S., 435, 464.
Ouachita Packet Co. *v.* Aiken, 121 U. S., 144.
Packet Co. *v.* St. Louis, 100 U. S., 423.
Dent *v.* West Va., 129 U. S., 114, 122.
Plumley *v.* Massachusetts, 155 U. S., 461.
Gibbons *v.* Ogden, 4 Wheat., 1, 203.
Railroad *v.* Husen, 95 U. S., 465.
Voight *v.* Wright, 141 U. S., 62, 66.

An examination of these cases will disclose that none of them are in point.

Barbier v. *Connolly*, 113 U. S., 27, simply decides that a municipal ordinance prohibiting from washing and ironing in public laundries and washhouses within defined territorial limits from ten o'clock at night until six in the morning, is a purely police regulation within the competency of a municipality possessed of the ordinary powers; and that the fourteenth amendment of the Constitution does not impair the police power of a State.

Mr. Justice Field, in delivering the opinion of the court, says: "It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning. * * * * The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of fire wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety."

In *Beer Co.* v. *Massachusetts*, 97 U. S., 25, the legislature of Massachusetts passed what is commonly known as the prohib-

itory liquor law, and under this law certain malt liquors belonging to the Boston Beer Company had been seized as it was transporting them to its place of business within the state with intent to sell them in violation of the said law. The court sustained the seizure, upon the ground that as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.

Leisy v. *Hardin*, 135 U. S., 129, simply decides that a statute of a state prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the state, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to congress the power to regulate commerce with foreign nations and among the several states.

This case is no authority for the exercise of the police power of a state in respect to an article which does not affect the health, morals, or safety of a community. This is clearly shown by the following extract from the opinion of the court, p. 112:

"If in the present case," said Mr. Justice Mathews, "the law of Iowa operated upon all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce among the states," and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of congress on the subject of interstate commerce by means of railroads, designed to remove trammels upon transportation between different states, and upon the subject of the transportation of passengers and merchandise (Revised Statutes, sections 4252 to 4289, inclusive), including the transportation of nitroglycerine and other similar explosive substances, with the proviso that, as to them, "any state, territory, district, city or town within the United States," should not be prevented by the language used "from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein," is referred to as indicative of the intention of congress that the transportation of commodities between the states shall be free, except where it is positively restricted by congress itself, or by states in particular cases by the express permission of Congress. It is said the law in question was not inspection law, the object of which "is to improve

the quality of articles produced by the labor of a country" to fit them for exportation; or, it may be for domestic use." *Gibbons* v. *Ogden*, 9 Wheat., 1, 203; *Turner* v. *Maryland*, 107 U. S., 38, 55. Nor could be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of a community; nor a law to prevent the introduction into a state of diseases, contagious, infectious, or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce prohibited by the Constitution; and the observations of Mr. Justice Catron, in *The License Cases*, 5 How., 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police of the state, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the state to bring within power "any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claim to propriety as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing."

Morgan v. *Louisiana*, 118 U. S., 435, decides that the system of quarantine laws, established by statutes of Louisiana, is a rightful exercise of the police power for the protection of health, which is not forbidden by the Constitution of the United States.

The requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute, for examination as to her sanitary condition, and the ports from which she came, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax within the meaning of the Constitution concerning tonnage tax imposed by the states.

The court, in its opinion, at page 464, says:

"For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of federal authority, as defined by the Constitution, the latter must prevail. *Gibbons* v. *Ogden*, 9 Wheat, 1, 210; *Henderson* v.

The Mayor, 92 U. S., 259, 272; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 661."

It will hardly be contended that this case is an authority for the exercise for the police power in respect to matters which do not affect the health, morals or safety of the community.

Ouachita Packet Co. v. *Aiken*, 121 U. S., 444, decides that a municipal ordinance of New Orleans, which authorizes the collection of a wharfage rate, to be measured by the tonnage of the vessels which use the wharves, and estimated to be sufficient to light the wharves, and to keep them in repair, and to construct new wharves as required, and which may realize a profit over these expenses, does not conflict with the Constitution of the United States.

The court holds that the exactions of wharfage were substantially expended for the benefit of those using the wharves, and there was no satisfactory proof that the rates were exhorbitant or excessive. The case was held to be within the principle of the former decisions of this court, which affirm the right of a state, in the absence of regulation by congress, to establish, manage and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce. The case does not sustain the defendants' contention.

Packet Co. v. *St. Louis*, 100 U. S., 423, decides that "a municipal corporation, owning improved warves and other artificial means, which it maintains at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the Constitution of the United States from charging and collecting from parties using its warves and facilities such reasonable fees as will fairly remunerate it for the use of the property."

This case is not in point.

Dent v. *West Virginia*, 129 U. S., 114. In this case a statute of West Virginia required every practitioner of medicine in the state to obtain a certificate from the state board of health that he is a graduate of a reputable medical college, or that he has practiced medicine in the state continuously for ten years, or that it has been found, upon examination, that he is competent to practice medicine in all its branches. The statute was upheld as a proper exercise of the police power of the state, as a protection to the community affecting the health and life of the persons who might fall into the hands of the physician. The law was intended to procure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under the authorities of the state.

The case of *Plumley* v. *Massachusetts*, 155 U. S., 461, is cited. This case may be easily distinguished from the present one. This court upheld a statute of the state of Massachusetts to prevent deception in the manufacture and sale of imitation butter. This statute *forbade the sale of deceitful* imitations of this article of food. But the court in *Plumley* v. *Massachusetts* would hardly have upheld a tax of a cent a pound upon genuine butter as well as oleomargarine for the purpose of paying the expenses of the inspection and detection of the latter. The validity of an inspection law or the excessive character of the inspection tax did not come in question in the case.

This is a case where a statute was sustained under the police power of the state, because it was promotive of the *health* of the community. The public were protected against the introduction and sale of a spurious article of food.

Gibbons v. *Ogden*, 9 Wheat., 1, 203, decides that the acts of the legislature of the state of New York granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that state with boats moved by fire or steam for a term of years, are repugnant to that clause to the constitution of the United States which authorizes congress to regulate commerce, so far as the said acts prohibit vessels licensed according to the laws of the United States from carrying on the coasting trade, from navigating the said waters by means of fire or steam. This case is not in point.

Railroad v. *Husen*, 95 U. S., 465, decides that the statute of Missouri, which prohibits driving or conveying any Texas, Mexican or Indian cattle into the state between the first day of March and first day of November in each year, is in conflict with the clause of the constitution that ordains: "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the indian tribes.

Such a statute is more than a quarantine regulation, and not a legitimate exercise of police power of the state. That power cannot be exercised over the inter-state transportation of subjects of commerce.

While a state may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the state, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory. Neither the unlimited powers of a state to tax, nor any of its large police powers can be exercised to such an extent as to work a practical as-

sumption of the powers conferred by the constitution upon congress. Since the range of a state's police power comes very near to the field committed by the constitution to congress, it is the duty of courts to guard vigilantly against any needless intrusion.

This case can scarcely be invoked as a warrant for the exercise of the police powers, where public health, safety or morals are not concerned.

Voight v. *Wright*, 141 U. S., 62, decides the act of Virginia, of March, 1867, (now repealed,) as set forth in c. 86, Code of Virginia, ed. 1873, providing that all flour brought into the state and offered for sale therein shall be reviewed, and have the Virginia inspection marked thereon, and imposing a penalty for offering such flour for sale without such review or inspection, is repugnant to the commerce clause of the Constitution, because it is a discriminating law, requiring the inspection of flour brought from other states when it is not required for flour manufactured in Virginia. Of course a discriminating law may be unconstitutional upon that ground alone, but it does not follow that, because it does not discriminate, it is therefore constitutional. *Minnesota* v. *Barber*, 136 U. S., 313.

The following authorities sustain the plaintiff's position upon this point:

The following authorities sustain the plaintiff's position upon this point:

"It is unfortunate that in describing police legislation judges frequently speak, not only of the health and morals but the welfare of society. If "welfare" is a general name for the first two objects then it is a useless repetition; if it is used in its broad sense, "denoting the good of mankind," police laws might in theory cover every act of the legislature. This would destroy the very act of separating the police powers from the mass of legislation reserved to the states, viz., that certain special rules should be applied when we examine the question of their constitutionality. And, we may observe that, notwithstanding the numerous dicta to the effect that the police powers included all those laws passed for the welface of society, the actual decisions have never extended the term beyond the public health and public safety. Thus, in *Chy Lung* v. *Freeman et al.*, 92 U. S., 275, a law of the state of California professedly to preserve the health of the citizens, which practically excluded immigrants from China, though undoubtedly for the "welfare" of the state, was declared unconstitutional. And a law which regulated the delivery of telegrams received from or sent to points in other states, though upheld by the courts of Indiana as a police regulation, was declared void by the supreme court of the United States."

Lewis' Fed. Power over Commerce, 103.

"In *Powell* v. *Penna*, 127 U. S., 695, the court seems to have given a more extended meaning to police legislation. We cannot but think that the dicta in that case will not be sustained. The state had prohibited the manufacture and sale of oleomargarine. Powell was indicted for such sale. It was notorious that this law was passed in the interest of the dairymen, and that oleomargarine properly made was not in the least deleterious to public health. The state's right to prohibit the manufacture is undoubted, but we should not call it the exercise of a police power simply because the legislature has stated its object to be the perservation of the health of the community. All drinking on account of the example to others may, perhaps, reasonably be considered as detrimental to the public health, but it illustrates the utmost limit to which we can carry this kind of argument. To call the eating of sound butter, because it does not happen to be made from the milk of a cow, detrimental to the health of the community, is absurd."

Lewis' Fed. Power over Commerce, 104.

"If the intention of the members of the legislature was solely to benefit the health or morals of the community, but the act in its evident operation goes beyond what is absolutely necessary for this end, at the same time deals with matters and things not under the control of the state, it is void."

Ibid, p. 106.

"The three cases of *Bowman* v. *Chicago*, *Leisy* v. *Hardin*, and *in re* Rahrer, have done more to clear the intricate subject of the federal power over commerce and its effect on state action than any other cases ever decided by the supreme court. They put beyond all question the fact that the power over interstate and foreign commerce is exclusively in congress, and that no exception will be made of the police legislation of the states." *Ibid.*, 123.

"Undoubtedly this power of the state extends to all regulations, affecting not only the health but the good order, morals and safety of society; but a law does not necessarily fall under the class of police regulations, because it is passed under the pretense of such regulation, as in this case, by a false title, purporting to protect the health and prevent the adulteration of dairy products and fraud in the sale thereof. It must have in its provisions some relation to the end to be accomplished. If that which is forbidden is not injurious to the health or morals of the people, if it does not disturb their peace or menace their safety, it derives no validity by calling it a police or health law;

whatever name it may receive, it is nothing less than an unwarranted interference with the rights and liberties of the citizen."

Powell v. *Penn.*, 127 U. S., 695.

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, as is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Mugler *v.* Kansas, 123 U. S., 623, 661.

"The police power extends to such legislation as is required to protect the comfort, health and lives of all persons within the jurisdiction of the state and also to care for the property located within the same. It justifies the adoption of regulations to prevent the commission of crime, and the spreading of disease. It authorizes rules for the suppression of vice and of various kinds of social evils, for the prohibition of lotteries, gambling, and nuisances. Whatever this power may include, I think, it is clear that it does not embrace a subject confided by the constitution exclusively to congress."

R. R. Co. *v.* Husen, 95 U. S., 259.
Crutcher *v.* Kentucky, 141 U. S., 47.

"By the settled doctrines of this court, the police power extends at least to the protection of the lives, the health and property of the community against the injurious exercise by a citizen of his own right."

Patterson *v.* Ky., 97 U. S., 504.

"It extends to the protection of the lives, limbs, comfort and quiet of all persons, and may exclude from introduction into the state contagious and infectious diseases; may make inspection laws, and may exclude or prevent the introduction of criminals, convicts, paupers, idiots, lunatics and others likely to become a burden or public charge, so far as it may be exercised without interfering with the power of congress over the subject of commerce hereinbefore referred to.

Leisy *v.* Hardin, 135 U. S., 100.
O'Neil *v.* Vermont, 144 U. S., 223.
Bowman *v.* Railway Company, 125 U. S., 465.
Butchers' Union Co. *v.* Crescent Co., 111 U. S., 746.
Munn *v.* Illinois, U. S., 113.
Budd *v.* New York, 143 U. S., 517.

SEVENTH. THE NON-ACTION OF CONGRESS MEANS THAT INTERSTATE COMMERCE SHALL BE UNTRAMMELED AND IS NO SANCTION OF A STATE LAW TO REGULATE COMMERCE.

"Another established doctrine of this court is, that where the powers of congress to regulate is exclusive the failure of congress to make express regulations indicates its will and the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom." This was held by Mr. Justice Johnson in *Gibbons* v. *Ogden*, 9 Wheat., 1, 222; by Mr. Justice Grier in the *Passenger Cases*, 7 How., 283, 462; and has been affirmed in subsequent cases. *State Freight Tax cases*, 15 Wall., 232, 279; *Welton* v. *Missouri*, 91 U. S., 275, 282; *Railroad Co.* v. *Husen*, 95 U. S., 465, 469; *County of Mobile* v. *Kimball*, 102, 691, 697; *Brown* v. *Houston*, 114 U. S., 622, 631; *Walling* v. *Michigan*, 116 U. S., 446, 455; *Pickard* v. *Pullman Palace Car Co.*, 117 U. S., 34; *Wabash R. Co.* v. *Illinois*, 118 U. S., 557; *Bowman* v. *Railroad Co.*, 125 U. S., 465.

EIGHTH. BY FAILURE TO DISCUSS OR REAFFIRM ALL THE POSITIONS TAKEN IN OUR FIRST BRIEF, WE DO NOT WISH TO BE UNDERSTOOD AS ABANDONING ANY OF THEM.

THOS. N. HILL,
JOHN W. HINSDALE,
Solicitors for Complainants and Appellants.

RALEIGH, N. C., May 14th, 1896.